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No. 06-427

IN THE

Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* BRIDGES ACADEMY, NASHVILLE, TENNESSEE

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March 27, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
INTRODUCTION AND SUMMARY	2
ARGUMENT	4
I. BRIDGES AC~~ADEMY~~ HAS A UNIQUE STORY THAT IT SHOULD BE ALLOWED TO TELL PROSPECTIVE STUDENTS	4
II. THE RECRUITING RULE IS AN UNCONSTITUTIONAL TIME, PLACE, AND MANNER RESTRICTION ON THE FREEDOM OF SPEECH THAT PRIVATE SCHOOLS ENJOY UNDER THE FIRST AMENDMENT	6
A. The Recruiting Rule is vague	8
B. If the Recruiting Rule is not vague, then it is overbroad	10
III. NEITHER BRIDGES NOR BRENTWOOD OBJECT TO REASONABLE, CLEAR PROHIBITIONS ON RECRUITING MISCONDUCT	12
IV. BRIDGES HAS NO ALTERNATIVE BUT TO BELONG TO TSSAA, A STATE ACTOR	13
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288 (2001)	13
City of Houston v. Hill, 482 U.S. 451, 451-452 (1987)	8-9
Frisby v. Schultz, 487 U.S. 474, 485 (1988)	11
Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972)	10
Keyishian v. Board of Regents, 395 U.S. 589, 599 (1967)	10
United States v. O'Brien, 391 U.S. 367, 382 (1968)	7
Village of Hoffman Estates, 455 U.S. 489, 494-495 (1982)	8
Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)	8, 11

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STATEMENT OF INTEREST [1]

Bridges Academy ("Bridges") is a start-up independent secondary school in Nashville, Tennessee.[2] Bridges will accept its first class of students this summer, ahead of the 2007-2008 school year. Bridges is opening with the goal of

[1] The parties have consented to the filing of this *amicus* brief. Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that none of the parties nor their counsel wrote this brief in whole or in part and that no one other than *amicus* made any monetary contribution to the preparation or submission of this brief.

[2] The school's website can be found at http://www.bridgesacademy nashville.org

serving as a Christian, college-preparatory, middle school and high school designed to mold inner-city boys into community leaders. The school offers a full range of core academic subjects, as well as specialty topics such as entrepreneurship, technology, community leadership, music, and programs in the arts.

Athletics and sportsmanship are central to the school's mission of molding boys into community leaders. As such, Bridges plans to be a member of the Tennessee Secondary School Athletic Association ("TSSAA") for the 2008-2009 school year, when the school fields its first class of seventh grade students.

Bridges has a strong interest in seeing that its First Amendment rights to openly and honestly recruit both athletes and student non-athletes are preserved. With athletics and sportsmanship being so central to its mission, Bridges must be a member of TSSAA to be successful. Yet TSSAA's Recruiting Rule directly and substantially chills the ability of Bridges to employ its person-to-person, face-to-face model of recruiting at-risk inner-city youth because the Recruiting Rule places unconstitutional restrictions on the school's right to communicate with prospective students.

INTRODUCTION AND SUMMARY

Bridges is a start-up private school for boys in inner-city Nashville, Tennessee. Its target student population will be comprised of boys who are struggling in failing inner-city public schools, and who can benefit from a highly-structured, college preparatory environment that offers one-to-one contact between students and educators. This contact begins with the recruiting process, during which staff members and community volunteers representing the school visit the homes of potential students to conduct in-person interviews and informational sessions with the boys and their families.

TSSAA's Recruiting Rule directly chills constitutionally protected speech in which Bridges might otherwise engage, and threatens the efficacy of its entire recruiting model. That recruiting model is central to getting at-risk boys to enroll in Bridges. Other methods of distributing information—such as waiting for students and their parents to stumble upon the school's website—are ineffective at reaching the population that Bridges needs to reach. It is probable that athletics will be discussed during the home visits and afterward—such a conversation would naturally occur as the staff member or volunteer attempts to tell the school's story and convince the boys' parents to enroll them at Bridges.

The Recruiting Rule is either unconstitutionally vague (under TSSAA's interpretation) or unconstitutionally overbroad. Facially, the rule appears to prohibit nearly all contact between a private school and a potential student. This seems absurd, as private schools must be allowed to send applications, medical forms, reading lists, and the like to prospective students if they are to achieve their enrollment targets. If the Recruiting Rule does not intend to regulate these types of activity, then it chills protected speech through its vagueness. If the Recruiting Rule does in fact intend to prohibit all forms of contact between a private school and a prospective student, then it is vastly overbroad, and restricts whole swaths of constitutionally protected speech. It can only be one or the other. There is no saving interpretation.

Neither Bridges nor Respondent Brentwood Academy would object to a reasonable, narrowly-tailored recruiting rule that specifically targeted the acknowledged evil of recruiting misconduct. However, the Recruiting Rule is not such a rule. TSSAA's unwillingness to consider rewriting the Recruiting Rule exposes TSSAA's real motive in this case: to selectively use a vague Recruiting Rule to punish schools that are threatening the athletic dominance of the public school majority of its membership. What is needed, instead, is a set

of rules that are narrowly tailored to the evil they supposedly target.

ARGUMENT

I. BRIDGES ACADEMY HAS A UNIQUE STORY THAT IT SHOULD BE ALLOWED TO TELL PROSPECTIVE STUDENTS

The free exchange of information is a crucial component of the private school recruiting process. Unlike public schools, which may be the default choice for many students, private schools must be able to freely provide accurate and complete information to potential students and their families. This is especially true in the case of inner-city students, who may feel trapped by a failing public school system, but who may be unaware of private school alternatives. The private school must be able to tell its story to these families.

Bridges was founded with the express mission of reaching out to at-risk, inner-city boys, bringing them into a structured and nurturing educational environment, and molding them into leaders of their communities. The Bridges recruiting model therefore differs substantially even from those of other private schools. Public schools can, of course, rely on the fact that they are the default choice for most students. They do not need to do any outreach—students are routed to them automatically by the state. Even many established private schools have a sort of automatic recruiting system, where reputation, word of mouth, church affiliation, and rankings in independent reports ensure that students and parents are generally aware of the alternatives those schools offer.

Bridges, on the other hand, relies specifically on community outreach to find students and bring them through its doors. The internal organization of the school reflects this. Bridges is served by a Board of Directors and a Board of Advisors, each of which is composed of community leader volunteers. Many of the members of these boards were

themselves disadvantaged youth in inner-city Nashville. They see the school as a way to reach out to children who stand today where they stood twenty or thirty years ago. Thus, these board members play an active role in reaching out to the community and encouraging it to send its boys to Bridges. In addition to these board members, Bridges employs both paid staff and volunteers to go into the community around the school to identify and recruit boys who will benefit from the unique environment that Bridges offers. This usually involves in-home, one-on-one meetings with the student and his family. The entire model is built upon this personal, face-to-face approach.

Even the school day at Bridges is different from other schools. Somewhat unusually for a private school, Bridges provides bus transportation for students whose parents lack the ability to transport their children to school in the morning. The school day begins promptly at 8:00 A.M., and includes a complete college preparatory curriculum. For students whose caregivers cannot pick them up when the formal school day ends at 3:00 P.M., Bridges offers an after school program that runs until 6:30 P.M. The program is designed to keep students immersed in a positive, structured academic environment and away from negative influences. By beginning the day with private busing and ending it with a lengthy after-school program, including athletics, students spend more of each day in an environment that is geared toward ensuring their safety and success. Parents and caregivers who work during the day can be assured that their children are safe in school rather than on the streets or home alone.

The Recruiting Rule prevents Bridges from mailing the above summary to a prospective student because, under a strict reading of the Recruiting Rule, such a summary could constitute undue influence. Bridges has an important story to share with inner-city parents and their children. Its structure, focus, and methodology are unique, especially when Bridges

is compared to public schools that offer a standard school day, little one-on-one contact between students and educators, and minimal supervision of children once they are cut loose at 3:30 P.M. Obviously, the unique Bridges story will influence many parents to enroll their children there and influence the boys themselves to want to go.

People speak in order to influence others, and they are given freedom of speech so that they may influence others freely. TSSAA claims a justifiable concern about recruiting misconduct—a concern with which neither Bridges nor Respondent Brentwood Academy disagree. But under the guise of claiming to regulate undue influence, TSSAA has crafted a Recruiting Rule that prohibits nearly any influencing, due or undue, of potential students on the part of private schools. If the Recruiting Rule does not intend to regulate constitutionally protected speech, then it is vague; otherwise, it is overbroad. In either case, it should be re-written to narrowly capture the stated interest of TSSAA in curbing undue influence.

II. THE RECRUITING RULE IS AN UNCONSTITUTIONAL TIME, PLACE, AND MANNER RESTRICTION ON THE FREEDOM OF SPEECH THAT PRIVATE SCHOOLS ENJOY UNDER THE FIRST AMENDMENT

The Recruiting Rule is comprised of the simple rule plus a body of interpretive commentary. The simple Recruiting Rule seems straightforward: "The use of undue influence on a student (with or without an athletic record), the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes shall be a violation of the recruiting rule." J.A. 181. But the *Guidelines For Understanding The "Recruiting Rule" and Understanding "What Is Undue Influence?"* prove just how vague the Recruiting Rule actually is.

J.A. 181-187. The guidelines reveal that TSSAA has an expansive definition of undue influence, including "Any contact between a member of the coaching staff or representative of the school and prospective student/athletes prior to, during, or after contests at elementary schools, middle schools, and junior high schools except where there is a definite feeder pattern." J.A. 183.

Thus, no contact may occur before or after athletic events, but how far before or after? A day? A week? A month? The Recruiting Rule and its interpretive guidelines are silent on this question. The interpretive guidelines also provide that "[p]rivate or parochial schools may not contact students enrolled at the public schools." J.A. 183. Does this mean initial contact? Does it prohibit mass mailings? Does every meeting have to be initiated by the student if he is currently enrolled at a public school? The interpretive guidelines seem to imply that the prohibited contact is somehow related to athletics or athletic events, which might narrow the Recruiting Rule somewhat. But a plain reading of the interpretive commentary can only the school representative fearful that any contact at any time can, technically, violate the rule. This fear is further stoked by TSSAA's seemingly uneven enforcement actions.

Assuming the Recruiting Rule constitutes a restriction on the time, place, and manner of communication that may occur between private schools and students they are recruiting, its plain terms basically prohibit "any contact" between the school and the student prior to matriculation. *See United States v. O'Brien*, 391 U.S. 367, 382 (1968).[3] In the case of a

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[3] Bridges accepts for purposes of argument the Sixth Circuit's conclusion that the Recruiting Rule represents a time, place, and manner restriction on free speech. Other *amici*, specifically Christian Schools International, make a persuasive argument that the Recruiting Rule is a content-based restriction. We choose to address the Recruiting Rule here

time, place, and manner restriction on free speech, the Court should examine whether the restrictions are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Recruiting Rule leaves open no alternative channels of communication between the school and potential students. It closes them all off and leaves it up to the TSSAA to selectively determine when some invisible line has been crossed by a school in any particular instance. This results in a vague rule with which member private schools are uncertain how to comply. And if the Recruiting Rule is not vague—if it really does prohibit all contact between the schools and potential students—then it is overbroad. In either case it is unconstitutional. *Village of Hoffman Estates*, 455 U.S. 489, 494-495 (1982).

A. The Recruiting Rule is vague

No teacher, coach, or administrator could reasonably conclude that the "undue influence" targeted by the Recruiting Rule would literally include "any contact" between the school and the student. The Recruiting Rule is therefore facially vague and vague when read together with TSSAA's interpretive commentary. This is the same type of vagueness that was at issue in *City of Houston v. Hill*, 482 U.S. 451, 451-452 (1987), where a municipal ordinance prohibited "any manner" of speech that would interrupt a police officer in the course of his or her duty. This Court held that the ordinance was invalid because it gave the state "unconstitutional discretion in its enforcement." *Id.* at 466. The vagueness of the Recruiting Rule provides TSSAA a similar degree of unconstitutional discretion. In *Houston*, this Court noted that

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as a time, place, and manner restriction because we believe it cannot withstand constitutional scrutiny even under that more relaxed standard.

the ordinance was "admittedly violated scores of times daily, yet only some individuals—those chosen by the police in their unguided discretion—[were] arrested." *Id.* at 466-467. Private schools constantly send families application forms, medical release forms, curricula, notices, and reading lists. If TSSAA prosecuted every literal violation of the Recruiting Rule, the entire system of enforcement would crumble. Instead, TSSAA hides behind the vagueness of the rule to engage—as did the City of Houston—in discretionary prosecution.

It is precisely this fear of prosecution that chills the efforts of schools like Bridges to engage in constitutionally protected speech when they recruit and communicate with incoming students. Suppose the school has gotten word, through its connections in the community, that a particular boy would be a good candidate for the Bridges curriculum. Normally, the school would initiate contact through a staff member, board member, or community volunteer. This would usually include a home visit to discuss the opportunities that Bridges affords its students, the logistics of enrolling the student, and a question and answer period for the family. After the home visit, the school might follow-up by mailing an information packet to the family. If the student chose to enroll, the school would need to exchange a substantial amount of information with the family prior to matriculation. This would include applications, financial aid information, medical release forms, parental consent forms, details of the curriculum, and suggested summer reading lists.

Under the Recruiting Rule, all of the activities discussed above are suspect. Yet each activity listed above involves normal, legal, constitutionally protected speech. How is Bridges to know whether it is violating the Recruiting Rule or not? The simple rule prohibits "undue influence," but the interpretive guidelines seem to prohibit much more. J.A. 181-187. They state that "any contact" between the school

and the potential student is "a violation" of the Recruiting Rule. *Id.* Does this mean that the school cannot send any information at all to the student? In that case, the Recruiting Rule would be clear but overbroad, as discussed below. If all contact is not prohibited, then what type of contact is? The Recruiting Rule does not say, which means that, as in *Keyishian v. Board of Regents*, 385 U.S. 589, 599 (1967), no one "can know just where the line is drawn." It is up to TSSAA to determine whether a school has committed a violation.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). That is exactly what the Recruiting Rule does. It delegates the basic question of whether undue influence has occurred to a decision making body (TSSAA) without giving member schools fair warning of specifically prohibited conduct. The schools do not know what conduct is prohibited and are therefore unable to ensure their compliance with the Recruiting Rule.

B. If the Recruiting Rule is not vague, then it is overbroad

If the Recruiting Rule is not vague, then it is overbroad. It seems inconceivable that the Recruiting Rule literally pro-

hibits "any contact" between the school and the prospective student. Such a rule would completely stifle the recruiting efforts of Tennessee's private schools (tellingly, the rule excludes schools with a definite "feeder pattern," meaning nearly all public schools). If that is not what the Recruiting Rule intends to accomplish, then it is vague. Otherwise, it is overbroad. There is no saving interpretation.

The normal exchange of information between schools, students, and families involves speech that is clearly lawful and constitutionally protected. As we discuss further below, we do not argue with the state's claim that it has a compelling interest in protecting athletes from exploitation. But those rules must not—as they do here—be so overbroad that they also prohibit constitutionally protected speech. The Recruiting Rule even prohibits contact with students who have expressed no desire to participate in athletics at all. Such students are still, according to TSSAA, potential athletes, and are therefore subject to the same rules as actual athletes. J.A. 182. Thus, the Rule stands between the private school and its entire potential student body.

The Recruiting Rule fails the test articulated by this Court in *Ward*. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799. Unlike the regulation at issue in *Ward*, the Recruiting Rule does not sweep in some small portion of protected speech. This is not a case where the TSSAA has drafted thoughtful, deliberate rules to address undue influence which also happen to prohibit some constitutionally protected speech. Rather, TSSAA has crafted a rule that is so broad that, according to TSSAA's own interpretive guidelines, it prohibits *all* contact between the school and potential students. J.A. 181-187.

"A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

A literal reading of the Recruiting Rule means that TSSAA has enacted the equivalent of a complete ban on contact between potential students and private schools (those without an established feeder system). For this ban to be constitutional, the distribution of applications, information packets, financial aid information, and summer reading lists must each be "an appropriately targeted evil." The Recruiting Rule fails to meet that standard because the state has no independent interest in regulating such activities.

The Recruiting Rule leaves private schools adrift in open water and hoping that the TSSAA will not single them out for punishment. In reality, the schools must communicate with students and their families. Silence is not an option. This is especially true for a start-up school like Bridges and it is especially true for schools, like Bridges, that are conducting outreach to an inner-city population that may not be as sophisticated in its approach to education alternatives as other education consumers. So although these schools must continue to communicate, they do so in a climate of uncertainty and dread—uncertainty regarding whether TSSAA will deem any of their activities to be violations of the Recruiting Rule, and dread that an infraction, once "identified," will negatively impact the athletic programs that are such an integral part of their curricula.

III. NEITHER BRIDGES NOR BRENTWOOD OBJECT TO REASONABLE, CLEAR PROHIBITIONS ON RECRUITING MISCONDUCT

We recognize that schools and coaches do sometimes inappropriately recruit student athletes. To the extent that students are pressured or deceived into making decisions that are against their best interests, all schools—public and private—share a responsibility to help mitigate the problem. Bridges does not object to a reasonable Recruiting Rule that specifically targets recruiting misconduct. To the extent that

schools and coaches are bribing, pressuring, or lying to potential athletes in order to recruit them, that behavior should be curbed and there is a legitimate state interest in doing so.

Perhaps even more than most states, high school athletic events in Tennessee are highly competitive. Bridges would not object to TSSAA promulgating a set of clear, specific, narrowly-tailored guidelines to prevent student athletes from being exploited by schools and coaches. However, such a set of rules would apparently not satisfy TSSAA. Rather than a set of clear, reasonable rules, TSSAA favors the existing Recruiting Rule. The status quo allows TSSAA to selectively target schools it wants to punish, then use the Recruiting Rule to weaken those schools' athletic programs to the benefit of the public schools whose members control TSSAA's governance. Robert Morris Rogers, a board member of TSSAA, has admitted that the Recruiting Rule is "really for protection of schools and coaches" and that its focus is "keeping them from losing their best players." J.A. 368-69. We should not be surprised that TSSAA is unwilling to consider a new set of rules because, by doing so, they would lose the Recruiting Rule as a pretextual basis for discriminating against private schools.

IV. BRIDGES HAS NO ALTERNATIVE BUT TO BELONG TO TSSAA, A STATE ACTOR

This Court decided the state action question in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), although TSSAA has asked the Court to reexamine it. Pet. Br. At 46-50. Both Brentwood and other *amici* have briefed the state action question in depth; therefore, Bridges will not revisit those same arguments here. Bridges would note, however, that Brentwood and other *amici* are correct when they argue that Tennessee secondary

schools that wish to participate in athletic competition have no realistic option except to join TSSAA.

Especially as a start-up school, Bridges has no existing competitors. Virtually all high school athletics in Tennessee are regulated by TSSAA, and the natural competitors of Bridges are other members of TSSAA. Bridges has no realistic alternative but to join TSSAA if it wants to offer athletics as part of its curriculum, and such activities are especially important to Bridges and the type of students it has as its mission to recruit. The students and families to whom Bridges reaches out view athletics as an important part of the school experience. The boys who will be playing on the school's teams will learn important life lessons about sportsmanship and teamwork on the playing field that they cannot learn elsewhere in the curriculum. To be successful in its mission, Bridges must offer athletics. And to offer a legitimate athletics program, Bridges has no alternative but to join TSSAA.

CONCLUSION

Respectfully, for the reasons stated above as well as those in Respondent's brief, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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